BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES F. MCCANN	)	
Claimant	)	
	)	
VS.	)	
	)	
SPECIAL EDUCATION COOPERATIVE	)	
Respondent	)	Docket No. 1,014,135
	)	
AND	)	
	)	
KS. ASSN. OF SCHOOL BDS. WCF INC.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the September 7, 2005 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on December 20, 2005.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant injured his back lifting a desk at work. At the regular hearing, the disputed issues between the parties included the amount of claimant's average weekly wage, his entitlement to temporary total disability compensation as well as the nature and extent of his disability.

The Administrative Law Judge (ALJ) awarded claimant a 10 percent functional impairment but denied his request for a work disability. The ALJ determined the claimant returned to the same job making the same wage and later voluntarily resigned from respondent's employment. The ALJ concluded those facts demonstrated claimant's ability to earn the same wage after his injury and but for his voluntary resignation he would have

continued to make that wage. The ALJ further determined that because claimant was a full-time employee for respondent his part-time wages for another employer could not be included in the calculation of his average weekly wage. Finally, the ALJ found the claimant failed to prove that he was entitled to temporary total disability compensation.

The claimant requests review of the nature and extent of his disability as well as the determination of his average weekly wage. Claimant argues he was a part-time employee for respondent because he worked less than 40 hours a week and his average weekly wage should have included $90 per week he earned performing the same type of part-time work for another employer. Claimant further argues his resignation from work with respondent was coerced and, consequently, he is entitled to a 72 percent work disability.

Respondent requests the Board to affirm the ALJ's decision limiting claimant to a functional impairment and not including the part-time weekly wage in his average weekly wage. But respondent argues the claimant's functional impairment should be decreased to 5 percent based on Dr. Chris E. Wilson's rating.

The issues for determination by the Board on this review are:

1. What is claimant's average weekly wage?

2. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

1. What is claimant's average weekly wage?

The ALJ denied claimant's request to calculate his average weekly wage as if he were a part-time worker. Instead, the ALJ determined that claimant's average weekly wage was $287, which was based upon $8.20 per hour for a 35-hour work week which constituted full-time employment with respondent. The ALJ denied claimant's request to include $90 per week that claimant earned performing part-time work for a different school district as a monitor on a school bus that transported students to respondent's facility.

The respondent hired claimant to work on a full-time basis seven hours a day, five days a week. The respondent's administrator, Mick Tener, testified that claimant was hired as a paraprofessional and all para educators were paid for a seven-hour workday and five-day work week which was considered to be full-time employment. As a full-time employee claimant was eligible for the same insurance benefits provided the teachers. Mr. Tener's testimony was uncontradicted.

Claimant argues that because he was expected to work less than 40 hours a week he should be considered a part-time employee and his average weekly wage should be calculated accordingly.

The Act defines part-time and full-time workers in K.S.A. 2003 Supp. 44-511(a) as follows:

> (4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
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> (5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, **or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.** (Emphasis Added)

Although claimant agreed to work on a regular basis for less than 40 hours per week that does not preclude a finding that he was a full-time hourly employee. A determination that claimant is a full-time hourly employee under the second alternative definition provided by K.S.A. 2003 Supp. 44-511(a)(5) may be made without finding the claimant was outside both definitions of a part-time hourly employee provided by K.S.A. 2003 Supp. 44-511(a)(4). It simply must be established that claimant was employed in a trade or employment where employees are considered full-time by custom of such employment regardless of the number of hours worked per day or per week.[1]

As previously noted, the uncontradicted testimony of Mr. Tener established that it was customary for paraprofessionals such as claimant to be considered full-time hourly employees. The Board affirms the ALJ's determination that claimant was a full-time hourly employee.

K.S.A. 2003 Supp. 44-511(b)(4) provides for the determination of the average gross weekly wage in the following manner:

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[1] *Guebara v. Green-Glo Turf Maintenance, Inc.*, 16 Kan. App. 2d 159, 819 P.2d 135 (1991).

> (4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

The claimant's daily money rate is determined by multiplying claimant's straight-time hourly rate ($8.20) by the customary number of working hours (7) which constitutes an ordinary work day for respondent's paraprofessionals. This calculation results in a daily money rate of $57.40. The straight-time weekly rate is found by multiplying the daily money rate ($57.40) by the number of days the claimant usually and regularly worked (5) and because respondent's paraprofessionals regular and customary work week is less than 40 hours the number of hours in respondent's regular and customary workweek (35) shall govern. Accordingly, claimant's weekly base wage is based upon 35 hours, which is multiplied by the $8.20 per hour that he earned. Multiplying $8.20 per hour by 35 hours yields an average gross weekly wage of $287.

Claimant further argues his base wage should be increased to include the $90 per week he earned working part-time for a different school district as a monitor on the bus that transported students to respondent's school. The Board disagrees.

In support of his argument the claimant relies upon K.S.A. 2003 Supp. 44-511(b)(7) which provides:

> The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, **in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross**

> **weekly wage of such employee paid by all the employers in such multiple employment.** The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment. (Emphasis Added)

The multiple employment wage aggregation authorized by K.S.A. 2003 Supp. 44-511(b)(7) applies only to a worker employed exclusively in part-time employments of a similar nature and does not apply to a worker employed on a full-time basis who also works part-time.[2] In this case the claimant was employed full-time for respondent and part-time for another school district. Thus, no aggregation of wages is authorized and the ALJ correctly calculated claimant's average gross weekly wage.

2. What is the nature and extent of claimant's injuries and disability?

On August 15, 2003, the claimant was lifting old desks to take them to the city dump. He experienced pain in his leg and back while lifting a desk. Respondent referred the claimant for medical treatment at Occupational Health at Mt. Carmel Medical Center. The claimant was referred to a chiropractor, Dr. Kim J. Voss. An MRI of the lumbar spine was interpreted as showing asymmetric bulging of the L4-5 disk to the right. Claimant was then referred to Dr. James K. Cole, an orthopedic surgeon. Dr. Cole prescribed pain medication.

Claimant was not satisfied with the treatment provided and sought additional treatment from the Veterans Administration. It is unclear from the record whether he received any treatment beyond diagnostic testing. At some point the claimant went to the emergency room at St. John's Hospital in Joplin, Missouri, with complaints of leg pain.

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant on December 23, 2003. The doctor diagnosed the claimant with a disk injury at L4-5 superimposed upon probable spinal stenosis. Dr. Prostic opined the claimant's condition was caused or contributed to by the accident at work. The doctor recommended epidural steroid injections and if the injections did not provide relief then an EMG or CT myelography should be done.

Claimant was then referred for treatment with Dr. Chris E. Wilson, a board certified orthopedic surgeon. Dr. Wilson first examined claimant on April 8, 2004, and noted claimant complained of lower back and right sided lower extremity pain. The doctor diagnosed claimant with a lumbar disk bulge at L4-L5 with symptoms of right lower extremity nerve root irritation. The doctor prescribed a series of epidural injections.

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[2] *Wade v. Union Nat'l Bank*, 10 Kan. App. 2d 645, 707 P.2d 1087, *rev. denied* 238 Kan. 879 (1985).

On May 20, 2004, Dr. Wilson released claimant without any permanent restrictions and assigned claimant a 5 percent impairment rating based upon DRE Lumbosacral Category II of the AMA *Guides*[3]. On June 17, 2004, the claimant returned and noted that his lower extremity radicular pain had resolved but he still experienced constant low back pain. Claimant also complained of right ankle pain. Dr. Wilson concluded the ankle complaints were not connected with claimant's August 15, 2003 accidental injury.

On June 28, 2004, the claimant was seen again by Dr. Prostic with regard to low back complaints and numbness in his right lateral lower leg and foot. Based on the AMA *Guides*, the doctor opined the claimant has a 15 percent impairment of function to the body as a whole due to injury to the L4-5 disk, symptoms of S1 radiculopathy and tarsal tunnel syndrome. Dr. Prostic placed the following restrictions on the claimant: (1) avoid lifting weights greater than 40 pounds occasionally or 50 pounds frequently; (2) avoid frequent bending or twisting at the waist; (3) avoid forceful pushing or pulling; (4) minimal use of vibrating equipment; and, (5) avoid captive positioning.

The ALJ awarded claimant a 10 percent functional impairment. This percentage was a split of the rating opinions offered by the parties' medical experts. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[4]

Dr. Prostic assessed claimant a 15 percent impairment to the body as a whole based upon the AMA *Guides* (4th ed.). However, Dr. Prostic used the range of motion section rather than the DRE, even though he acknowledged that the AMA *Guides* recommend the use of the DRE for lumbosacral ratings. Dr. Prostic further acknowledged that he did not use the Guides' recommended two-point inclinometer in making his range of motion calculations. Finally, Dr. Prostic did acknowledge that using the DRE method, claimant would have a 5 percent impairment to the body as a whole for his back.

Conversely, Dr. Wilson treated claimant for a relatively short period of time and after some epidural steroid injections released claimant without any restrictions.

Although doctors can disagree on the utilization and interpretation of the AMA *Guides*, in this instance Dr. Prostic's variance from recommended protocols reduces the the weight to be accorded his rating opinion. Likewise, Dr. Wilson treated claimant for a relatively short period of time and after claimant received epidural steroid injections the

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[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[4] K.S.A. 44-510e.

doctor rated and released claimant without restrictions. Although claimant's radiculopathy had improved, the relief could well have been temporary due to the epidural injections.

The ALJ concluded both doctors' opinions had some merit. The ALJ noted:

> On the subject of functional impairment, Dr. Prostic testified that the claimant has a 15% impairment according to the AMA *Guides to the Evaluation of Permanent Impairment*, 4th Edition's Range of Motion Model, and a 5% impairment according to the *Guides*' Diagnosis Related Estimates Model. Dr. Prostic felt the Range of Motion Model was more appropriate in this case.
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> Dr. Wilson felt that the AMA *Guides*' Diagnosis Relate[d] Estimates Model was more appropriate in this case, and assigned a 5% permanent impairment rating on that basis. Both opinions seemed to have merit, and they were considered equally persuasive. The claimant's functional impairment is held to be the mean of the two opinions, or 10% to the body as a whole.[5]

The Board agrees and affirms.

Claimant argues he is entitled to a work disability (permanent partial general disability greater than the whole person functional impairment rating). Because claimant's injuries comprise an unscheduled injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e, which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption of having no work

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[5] ALJ Award (Sep. 7, 2005) at 5.

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the above-quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wages should be based upon his or her ability to earn wages rather than the actual wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[8]

Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[9]

In this case, the claimant continued to perform his regular job duties for about a month after his injury. On September 17, 2003, claimant's supervisor told the claimant that he had received some complaints about language claimant used around women and told him to be careful. The next day the claimant told his supervisor that he was resigning. His supervisor tried to talk him out of resigning but claimant said he was tired of working for respondent and filled out a resignation form. The supervisor's contemporaneous notes of the meeting indicated that claimant did not want to work there anymore.[10]

Claimant alleged that he was forced to resign by threatened sexual harassment lawsuits and that his supervisor had physically intimidated him into resigning.

The ALJ noted that claimant's testimony indicated that he tended to take an extreme view of things when recounting his injury and his job activities. That after his resignation he socialized with his supervisor which is contrary to his allegation that he was terrified of his supervisor. The ALJ concluded the supervisor's version of how claimant's employment ended was more persuasive. The ALJ noted:

> Considering the claimant's testimony, the respondent's position on how the employment ended is more believable. The claimant most likely resigned his position for what he perceived to be legitimate, personal reasons unrelated to the injury, rather than his supervisor's desire to terminate him on account of the injury,

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[8] *Id.* at 320.

[9] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[10] Tener Depo., Ex. 3.

> but mask the termination with a false sexual harassment charge and a coerced resignation.[11]

The Board agrees and affirms. The claimant's supervisor attempted to give him a friendly warning about his language around women. Because the supervisor cautioned claimant that they did not want any sexual harassment charges, the claimant then apparently overreacted and resigned.

Claimant voluntarily terminated his regular job with respondent that he was capable of performing and that paid the same wage as his pre-accident wage. Consequently, the Board will impute that wage to claimant. As this imputed wage exceeds 90 percent of claimant's pre-injury average gross weekly wage, claimant's permanent partial general disability benefits are limited to his functional impairment rating.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated September 7, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[11] ALJ Award (Sep. 7, 2005) at 5.